

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MICHAEL J. ZATTLIN,

Plaintiff-Appellant,

V

ALDEN STATE BANK, THOMAS R. LANE,  
CHARLES E. BARTZ, JR., and  
BRANDT FISHER ALWARD & ROY P.C.,

Defendants-Appellees.

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UNPUBLISHED

January 24, 2012

No. 299919

Kalkaska Circuit Court

LC No. 10-010387-NZ

Before: SAWYER, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

Plaintiff Michael J. Zattlin appeals as of right the trial court's order granting summary disposition in favor of defendants Alden State Bank, Thomas R. Lane, Charles E. Bartz, Jr, and Brandt Fisher Alward & Roy, P.C. (Brandt Fisher). Because the trial court did not err when it granted the motion, we affirm.

In this case, Zattlin sued defendants under MCR 2.612(C)(3) for damages and to set aside a 2009 order granting summary disposition in favor of the Bank in a prior case.<sup>1</sup> Lawyers from Brandt Fisher represented the bank in the prior case. Both parties to the prior case filed motions for summary disposition; and the Bank supported its motion with affidavits signed by Lane and Bartz. The trial court in that case ultimately granted summary disposition in favor of the Bank.

After the dismissal of his prior case, Zattlin filed this suit. In his complaint he alleged that Lane and Bartz did not have the personal knowledge and capacity to testify under oath regarding statements in their affidavits. Zattlin claimed that all defendants were aware of these deficiencies, yet Brandt Fisher still prepared and presented the affidavits to the court in the prior action. Here, the trial court determined that Zattlin's new suit was—in effect—premised on perjury and, for that reason, did not state a claim on which relief could be granted in an independent action. Accordingly, it dismissed this suit.

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<sup>1</sup> See *Zattlin v Alden State Bank*, Kalkaska Circuit Court (Docket No. 08-9841-CZ).

We review de novo a trial court's decision on a motion for summary disposition. *Feyz v Mercy Mem Hosp*, 475 Mich 663, 672; 719 NW2d 1 (2006). A motion brought under MCR 2.116(C)(8) looks at the pleadings alone and tests the legal sufficiency of the claim. *Id.* In reviewing a motion under MCR 2.116(C)(8), courts accept as true all factual allegations supporting the claim as well as reasonable inferences or conclusions drawn therefrom. *Kuhn v Secretary of State*, 228 Mich App 319, 324; 579 NW2d 101 (1998).

A court may entertain an independent action to set aside a judgment for fraud on the court. See MCR 2.612(C)(3). However, the relief provided under MCR 2.612(C) only applies to a judgment procured by extrinsic fraud. See *Stallworth v Hazel*, 167 Mich App 345, 355; 421 NW2d 685 (1988), citing *Rogoski v Muskegon*, 107 Mich App 730, 736; 309 NW2d 718 (1981) (interpreting a prior version of the court rule).<sup>2</sup> Extrinsic fraud is fraud outside the facts of the case which actually prevents the losing party from having an adversarial trial. *Sprague v Buhagiar*, 213 Mich App 310, 313; 539 NW2d 587 (1995). Extrinsic fraud is distinguishable from intrinsic fraud, which is a fraud within the case. *Id.* at 314. When a party conceals a material fact from the court or makes a material misrepresentation to the court within a case, the concealment or misrepresentation constitutes an intrinsic fraud. *Matley v Matley (On Remand)*, 242 Mich App 100, 101; 617 NW2d 718 (2000). Although perjury constitutes fraud in obtaining a judgment, it does not prevent a party from having an adversarial trial and rebutting the perjured testimony through his own case. *Rogoski*, 107 Mich App at 737. For that reason, perjury is a form of intrinsic fraud. *Id.* "This does not mean that a litigant is never entitled to relief from a judgment obtained by intrinsic fraud. However, this relief cannot be by independent action but, rather, must be by motion in the case in which the adverse judgment was rendered." *Id.*

Zattlin contends that his complaint made no mention of perjury and does not rely on perjury for recovery. Rather, he argues that defendants acted together to gain summary disposition thereby preventing him from fully exhibiting his case and from having a real contest before the trial court. Zattlin also contends that Brandt Fisher's preparation and presentation of affidavits that it knew were deficient was actionable and egregious conduct constituting the concealing of or the misrepresentation of a material fact.

Zattlin focuses on the acts of preparation and presentation of the affidavits, but the essence of his argument is that Lane and Bratz lacked personal knowledge and the ability to testify regarding the contents of the affidavit. The affidavits, however, indicated that Lane and Bratz could testify to the contents. Therefore, if the facts stated in the complaint are taken as true, then Zattlin has alleged that Lane and Bratz committed perjury and that Brandt Fisher aided and abetted that perjury by preparing the affidavits and presenting them to the court with full

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<sup>2</sup> In *Rogoski* the Court held that relief from intrinsic fraud must be sought via a motion in the case in which the adverse judgment was entered. *Rogoski*, 107 Mich App at 736.

knowledge that the averments were false.<sup>3</sup> And perjury is intrinsic fraud, which cannot support an independent cause of action under MCR 2.612(C)(3).

Zattlin's suggestion that a decision on a motion for summary disposition rather than advancement to a full trial is tantamount to a denial of an adversarial trial fails to acknowledge that he was part of the hearing on that motion and had an opportunity to present his own evidence rebutting the affidavits.

Finally, although we agree that Zattlin's appeal is without merit, we do not agree with defendants' argument that it amounted to a vexatious proceeding under MCR 7.216(C)(1). For that reason, we decline to award defendants their actual expenses. Nevertheless, as the prevailing parties, defendants may tax their costs. MCR 7.219(A).

Affirmed. Defendants may tax their costs. MCR 7.219(A).

/s/ David H. Sawyer  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly

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<sup>3</sup> "Any person who knowingly makes any false statement in an affidavit is guilty of perjury." MCL 565.451b. This statutory section relates to affidavits and facts affecting realty. In the present case, the affidavits related to money owed based on mortgages, foreclosures, and the sale of real estate.